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No. 06-791

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

WHITE HAT MANAGEMENT, LLC,

Petitioner,

v.

BEVERLY BLOUNT-HILL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner is a for-profit education management corporation that operates numerous community schools throughout Ohio. Petitioner was denied intervention in the underlying case which questions the constitutionality of various aspects of the Ohio Community Schools Act. The District Court denied Petitioner's motion to intervene after finding that the Ohio Attorney General adequately represented the Petitioner's interest. The Court of Appeals affirmed the District Court's judgment but found that there was no need to address the adequacy of representation since Petitioner failed to prove that its strictly economic interest satisfied the requirement that a proposed intervenor have a substantial interest in the litigation.

The questions presented are as follows:

Is an entity that was denied intervention by both the Trial Court and the Appellate Court considered a "party" entitled to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1)?

Whether a private company's indirect and strictly economic interest in a lawsuit is sufficient to support intervention as of right under Fed. R. Civ. P. 24(a) when Plaintiffs' Complaint does not challenge any contract to which Petitioner is a party and does not seek to have Petitioner's indirect economic interest eradicated.

PARTIES

A list of all parties to the proceeding in the court whose judgment is under review is as follows:

Petitioner: White Hat Management, LLC.

Respondents: Beverly Blount-Hill; Marcia D. Connors; Willie A. Terrell, President, Dayton Education Association; Board of Education of the State of Ohio; Department of Education of the State of Ohio; and Susan Tave Zelman in her official capacity as Ohio Superintendent of Public Instruction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS OF THE LOWER COURTS	1
JURISDICTION	1
STATUTES, ORDINANCES, AND RULES INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. PETITIONER CANNOT INVOKE THIS COURT'S JURISDICTION UNDER 28 U.S.C. § 1254(1)	5
II. THE RULING BELOW IS NOT IN CONFLICT WITH THE DECISIONS SET FORTH IN WHITE HAT'S PETITION FOR WRIT OF CERTIORARI	6
III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DECISION TO DENY WHITE HAT'S MOTION TO INTERVENE AS A MATTER OF RIGHT	10
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Bayard v. Lombard, 50 U.S. 530 (U.S.Pa. Jan. Term 1850). 5

Ex parte Cockcroft, 104 U.S. 578 (1881) 5

Ex parte Cutting, 94 U.S. 15 (1876) 6

Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co., 109 U.S. 168 (1883) 5

Maine v. Taylor, 477 U.S. 131 (1986) 5

New York Public Interest Group, Inc. v. Regents of the University of N.Y., 516 F.2d 350 (2d Cir. 1975) 8

Providence Baptist Church v. Hillandale Comm. Ltd., 425 F.3d 309 (6th Cir. 2005) 10

United States v. Alisal Water Corp., 370 F.3d 915 (9th Cir. 2004) 9

Utahns for Better Transp. v. U.S. DOT, 295 F.3d 1111 (10th Cir. 2002) 8, 9

LEGISLATIVE MATERIAL

28 U.S.C. § 1254(1) 1, 2, 4, 5, 6

Ohio Revised Code § 3314.08 ..... 1, 10

MISCELLANEOUS

Federal Rule of Civil Procedure 24(a) 1, 2, 7, 10

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS OF THE LOWER COURTS

The District Court's order overruling Petitioner's motion to intervene is unreported and reprinted in the Appendix to White Hat's Petition for Certiorari ("Pet. App.") at 19a-27a. The opinion of the Sixth Circuit Court of Appeals is unreported and reprinted at Pet. App. 1a-18a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 5, 2006. Petitioner is attempting to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND RULES INVOLVED

Rule 24(a)(2) of the Federal Rules of Civil Procedure reads as follows:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Ohio Revised Code §3314.08 sets forth the methodology for state formula aid funding for community school students. Pet. App. 28a-50a.

28 U.S.C. § 1254 reads: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . "

STATEMENT OF THE CASE

The District Court denied Petitioner's Motion to Intervene as a matter of right on the basis that Petitioner had failed to prove that its interests would not be adequately represented by the Ohio Attorney General, who was defending the named Defendants. Pet. App. 19a-27a. The Court of Appeals affirmed the District Court's judgment but found that there was no need to address or otherwise determine whether Petitioner satisfies the fourth element of a Rule 24(a)(2) inquiry, adequacy of representation, since Petitioner failed to satisfy the second element, which requires a substantial interest in the litigation. Pet. App. 1a-18a.

Petitioner claimed throughout the proceedings in the lower Courts, and again in its Petition for Writ of Certiorari, that should Plaintiffs prevail, Petitioner would cease to exist. As acknowledged by both lower Courts, Petitioner overstates the reach of Plaintiffs' Complaint. In their Complaint Plaintiffs simply seek to have the state formula aid afforded to community school students equal the state aid received and retained by the traditional public school districts for each of its students. Contrary to Petitioner's argument, Plaintiffs do not seek to have funding to community schools terminated, but rather, to have these students, along with traditional public school students,

receive state funding in a constitutional manner. If Plaintiffs were to obtain their desired outcome, funding to community school students, and thus, Petitioner, would not be reduced in any way. Instead, state formula aid funding to traditional public school district students would be increased so that the amount the traditional public school districts retained in state formula aid funding for each traditional student, after the community school deduction is subtracted, would match the amount of state formula aid funding received by each community school students. Therefore, contrary to Petitioner's assertions, its "very survival" is in no way threatened by this litigation.

Factual Background. White Hat is a for-profit education management corporation that enters into contracts with community schools to provide management services for such schools. White Hat usually receives approximately 97% of the state public funds that the community school receives.

The concept of community schools in Ohio was touted as presenting a unique alternative in public education that would exempt these schools from many statutory requirements in exchange for greater accountability. It was thought that the competition between community schools and traditional schools would raise academic results. Unfortunately, to date the vast majority of these community schools are significantly failing in their promise to achieve greater academic results. In fact, most of these schools have not even achieved the same level of academic progress as traditional public schools.

A suit challenging certain aspects of the constitutionality of the Community Schools statute and the State's implementation and oversight of these schools was

brought in two separate and unrelated state court cases. White Hat was permitted to intervene in these cases because there were specific allegations raised against the contracts to which White Hat was a party. There are no such similar allegations in the present case and therefore, the fact that White Hat was permitted to intervene in those cases has no bearing on whether White Hat should be permitted in the present case.

White Hat seeks to intervene in the present case for the sole purpose of trying to protect the substantial profit it realizes from managing these state funded community schools. It is this strictly economic interest that Petitioner claims affords it a right to intervene.

SUMMARY OF ARGUMENT

Petitioner was denied the right to intervene by both the Trial Court and the Appellate Court. As a result, Petitioner is not a "party" to the underlying lawsuit and therefore, cannot invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

Even should this Court find that its jurisdiction was properly invoked, White Hat's Petition for Writ of Certiorari should be denied. Plaintiffs-Respondents do not seek to "eliminate the funding for all community schools" as repeatedly alleged by Petitioner. Plaintiffs' position is that the current formula for funding community schools is unconstitutional, and seek to have the State devise a constitutional funding method.

Despite Petitioner's assertion otherwise, all of the cases cited by Petitioner that supposedly indicate a conflict

between the Sixth Circuit's decision and other Districts are easily distinguished from the case at bar. When read carefully, these cases are not at variance and do not require this Court's review.

None of the contracts to which White Hat is a party are challenged in the present case. Thus, White Hat does not have a direct interest in the litigation. Any peripheral interest that White Hat may have in the funding levels of community schools is indirect, strictly economic, and does not rise to the level of a substantial legal interest that would warrant intervention as of right. Further, any interest that White Hat may have is adequately represented by the Ohio Attorney General, who has a duty to zealously represent the State and defend the statute at issue.

ARGUMENT

I. PETITIONER CANNOT INVOKE THIS COURT'S JURISDICTION UNDER 28 U.S.C. § 1254(1).

28 U.S.C. § 1254 reads, with emphasis added, that "Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition **of any party** . . . " Statutes authorizing appeals as of right to Supreme Court are strictly construed. *Maine v. Taylor*, 477 U.S. 131 (1986).

It has long been the rule that a person or entity who is not a party is not entitled to appeal from a decision. *Bayard v. Lombard*, 50 U.S. 530 (U.S.Pa. Jan. Term 1850); *Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co.*, 109 U.S. 168 (1883); *Ex parte Cockcroft*, 104 U.S. 578 (1881). When a lower Court refuses to permit the movers to

intervene and become parties to the record, the decision is not susceptible of being reviewed by this court on appeal. *Ex parte Cutting*, 94 U.S. 15 (1876).

In this situation, Petitioner White Hat was denied intervention by both the Trial Court and the Appellate Court. Therefore, White Hat is not a "party" to the action and cannot invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

II. THE RULING BELOW IS NOT IN CONFLICT WITH THE DECISIONS SET FORTH IN WHITE HAT'S PETITION FOR WRIT OF CERTIORARI

In their Complaint, Plaintiffs do not challenge the contracts between the community schools and Petitioner White Hat. Instead, Plaintiffs' Complaint questions the funding mechanism codified in the Ohio Community Schools Act, the racial targeting of the placement of community schools, and the inability of the citizens of a school district to elect the number of members and organization of community school governing authorities.

Plaintiffs-Respondents do not seek to eliminate state formula aid funding to community schools, but simply seek to have a funding methodology devised for both community school and traditional public school students that complies with the U.S. Constitution. Ideally, Plaintiffs would like to see traditional public school district students receive and retain the same amount of state formula aid funds, per student, that community school students currently receive. Such an outcome would in no way whatsoever effect Petitioner's economic interest.

However, White Hat claimed at both the District Court and the Appellate Court levels that Respondent's Complaint seeks to prevent community schools from operating by declaring the Act unconstitutional. For this reason, White Hat claims it should be permitted to intervene as a matter of right. Fed. R. Civ. Pro. 24(a). Both the Trial Court and the Appellate Court found that Petitioner's argument was without merit and overstated the possible effect that Plaintiffs-Respondents' Complaint may have on Petitioner.

Nevertheless, Petitioner once again makes this same misstatement in their Petition for Writ of Certiorari. In fact, at least eleven times[1] in the Petition White Hat once

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[1] "[T]he Sixth Circuit denied White Hat Due Process to defend its very survival." Petition for Writ ("Petition") at 2.

"Plaintiffs seek to eliminate funding for all Ohio community schools." Petition at 3.

"White Hat's viability is at risk." Petition at 3.

" . . . if the Court granted the relief sought by the Plaintiffs, it would effectively end community schools in Ohio and, consequently, the solvency of White Hat's Ohio operations." Petition at 4.

" . . . should the Plaintiffs prevail, White Hat's business in Ohio will be extinguished." Petition at 9.

" . . . White Hat's business would not just be impaired, it would be extinguished in Ohio." Petition at 12.

" . . . White Hat's . . . very survival in Ohio depends on the outcome of the underlying litigation." Petition at 13.

"Here, the state funding source for community schools will be eliminated, not simply limited, if the Act is found to be unconstitutional." Petition at 14.

" . . . this lawsuit that is aimed at eliminating community schools in Ohio." Petition at 14.

" . . . a constitutional contest which could extinguish its business in Ohio." Petition at 15.

(Continued on following page)

again raises and tries to rely on this tiresome and melodramatic argument. This is a patently inaccurate categorization of Plaintiffs' lawsuit that is repeatedly made by Petitioner is an attempt to justify intervention.

Contrary to Petitioner's argument, the case of *New York Public Interest Group, Inc. v. Regents of the University of N.Y.*, 516 F.2d 350 (2d Cir. 1975) is not in conflict with the Appellate Court's decision in this case. In *New York*, the Regents admitted that the purpose of the statute in question was to protect the interests of some pharmacists at the possible expense of other pharmacists. *Id.* at 352. In the present case, Respondents do not seek to protect some for-profit management companies at the expense of the Petitioner. Further, in the *New York* case the pharmacists attempting to intervene not only had an economic interest in the litigation, but a professional interest as well. *Id.* at 352. In the case at bar, as evidenced by the manner in which Petitioner phrased the question presented for review, "interest is strictly economic in nature," Petitioner herein only has an economic interest. For the reasons set forth above, the *New York* case is easily distinguishable and not in conflict with the Sixth Circuit's decision.

Petitioner next argues that the Tenth Circuit's decision in *Utahns for Better Transp. v. U.S. DOT*, 295 F.3d 1111 (10th Cir. 2002) is in conflict with the Sixth Circuit Appellate decision in the present case. Again, a careful reading of the *Utahns* decision proves otherwise. In *Utahns*, the Plaintiff sought an order vacating all contracts to which

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" . . . economic rights are threatened by litigation in which the litigants seek to silence and destroy nonparties." Petition at 15.

the proposed intervenors were a party. *Id.* at 1112-13. In the present case, Plaintiffs-Respondents have not requested that any contract to which White Hat is a party be terminated or otherwise revised. Thus, the Tenth Circuit's decision in *Utahns* is clearly distinguishable from the present case.

Next, Petitioner argues that the Ninth Circuit's decision in *United States v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004) is in conflict with the Appellate Court's decision in this case. Once again, this is not true and the Petitioner grossly misquotes the *Alisal* Court's holding. Petitioner claims that while denying intervention, the *Alisal* Court held that "an economic interest *would be* sufficient if concrete and related to the subject matter of the action." Petition for Writ at p. 9.[2] (emphasis added). However Petitioner's representation to this Court of the *Alisal* Court's holding left out at least two important words ("non-speculative" and "underlying") and completely changed a key word to its advantage ("would" rather than "may"). At page 919 the *Alisal* court actually found, with emphasis added, that "a *non-speculative* economic interest *may be* sufficient to support a right of intervention" but the "economic interest must be concrete and related to the *underlying* subject matter of the action."

In the case at bar, any strictly economic interest White Hat may have had is purely speculative since

[2] The Petitioner cited page 920 of the *Alisal* decision for this proposition. However, a review of page 920 does not reveal any such passage. The only reference found on page 920 occurs when the Court explained that " . . . regardless of the phase of litigation at which an interest arises, that interest must be related to the underlying subject matter of the litigation."

Plaintiffs' complaint does not seek to have the funding to community schools reduced. Further, the underlying subject matter of Plaintiffs' Complaint is the constitutionality of the methodology with which the State distributes state foundation formula aid. Petitioner White Hat enters into contracts with the community schools, not the State, and receives its funding from the community school, not the State. Ohio Rev. Code § 3314.08. Thus, Petitioner's interest is not related to the underlying subject matter of the action.

III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DECISION TO DENY WHITE HAT'S MOTION TO INTERVENE AS A MATTER OF RIGHT.

Petitioner maintains that the Sixth Circuit decision created a "bright-line rule" that "an economic interest is never sufficient to intervene under Rule 24(a)." This is an incorrect summation of the Sixth Circuit's finding. In actuality, the Sixth Circuit cited *Providence Baptist Church v. Hillandale Comm. Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005), and agreed that a proposed intervenor need not have standing to intervene. Moreover, the Appellate Court considered and placed emphasis on the fact that in this case, White Hat "is not a party to any challenged contract nor is it directly targeted by Plaintiff's Complaint."

Thus, the Sixth Circuit's decision indicates that all relevant facts should be taken into consideration and even if a proposed intervenor does not have standing, it may still be permitted to intervene when the Complaint directly targets the intervenor or when the intervenor is a party to a challenged contract. Since Plaintiffs-Respondents do not target White Hat or any other management company, or challenge any contract to which

White Hat is a party, the Sixth Circuit properly considered all the attendant individual circumstances and was correct in denying White Hat's Motion to intervene as a matter of right.

CONCLUSION

Based upon all of the above, there is no conflict between the decisions cited by Petitioner's and the Sixth Circuit's opinion in the present case. Accordingly, there is no need for this court to grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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